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No.

In The

# Supreme Court of the United States

October Term, 1990

WILLIAM HARDING, WILLIAM WINCHESTER, ALDO GLUSSICH, and RICHARD E. THAXTER, JR.,

*Petitioners,*

*vs.*

THE CITY OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL PROTECTION); EDWARD O. WAGNER, JAMES M. HARRELL, EUGENE S. EGAN, and JAMES F. HANLEY,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## QUESTIONS PRESENTED

1. Whether state labor laws may regulate seamen's wages by conditioning wage increases on a seaman's waiver of the right to pursue his wage claims in federal court and a general release of all claims when such waiver and release violate general maritime law.

2. Whether a union may waive the rights of its member seamen to earned wages by an agreement to permit deductions which are not allowed by federal maritime law.

3. Did the United States Court of Appeals for the Second Circuit err as a matter of law in affirming the dismissal of Petitioners' Complaint for earned wages which challenged the legality under federal maritime law of a municipal collective bargaining agreement based on inconsistent state law.

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**In The**
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October Term, 1990

WILLIAM HARDING, WILLIAM WINCHESTER, ALDO GLUSSICH, and RICHARD E. THAXTER, JR.,

*Petitioners*

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THE CITY OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL PROTECTION); EDWARD O. WAGNER, JAMES M. HARRELL, EUGENE S. EGAN, and JAMES F. HANLEY,

*Respondents*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

William Harding, William Winchester, Aldo Glussich and Richard E. Thaxter, Jr., the petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on May 8, 1990.

## OPINIONS BELOW

1. The order of the United States Court of Appeals for the Second Circuit denying rehearing and rehearing *en banc*, dated and entered June 18, 1990, is printed in the Appendix hereto, *infra* at p. 1a. It is not officially reported.

2. The opinion and judgment of the United States Court of Appeals for the Second Circuit, dated and entered May 8, 1990, is printed in the Appendix hereto, *infra* at p. 3a. It is not officially reported.

3. The opinion and order of the District Court, dated May 20, 1988, is printed in the Appendix hereto, *infra* at p. 5a. It is not officially reported.

4. The opinion and order of the District Court, dated February 3, 1989, is reported at 704 F. Supp. 531 (S.D.N.Y. 1989), and is reprinted in the Appendix hereto, *infra* at p. 11a.

5. The opinion and order of the District Court, dated March 8, 1989, is reported at 707 F. Supp. 757 (S.D.N.Y. 1989) and is reprinted in the Appendix hereto, *infra* at p. 19a.

6. The opinion and order of the District Court, dated November 1, 1989, is reported at 724 F. Supp. 1129 (S.D.N.Y. 1989) and is reprinted in the Appendix hereto, *infra* at p. 24a.

## JURISDICTION

This Petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit entered on May 8, 1990. A timely petition for rehearing or rehearing *en banc* was denied on June 18, 1990.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. §1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article III, §2 and Article VI, clause 2 of the Constitution of the United States are printed in the Appendix hereto, *infra* at p. 34a.

Title 46 U.S.C. §596, 574, 578, 599, 600, 603 and 604 and revised Title 46, §10501, 10504, 10506 and 11107 are printed in the Appendix hereto, *infra* at p. 35a.

## STATEMENT OF THE CASE

Petitioners, American seamen employed by the City of New York, have not been paid a part of their earned wages since 1982. William Harding is a Marine Oiler; William Winchester, a Master; and Aldo Glussich and Richard E. Thaxter, Jr. are Chief Engineers. They work aboard diesel-propelled sludge vessels owned and operated by the City of New York which travelled between various sites in the Port of New York and dump sites on the high seas in international and interstate waters.

Petitioners filed suit against the City of New York to recover earned wages and penalty wages pursuant to Title 46 U.S.C. §596 for the wrongful withholding of earned wages as well as damages for violation of their civil rights pursuant to Title 46 U.S.C. §1983. The complaints invoked the maritime jurisdiction of the United States District Court for the Southern District of New York pursuant to Title 28 U.S.C. §1333.

In the original Complaint, filed on May 20, 1986, petitioners Harding, Winchester and Glussich alleged that the City of New York wrongfully withheld four hours of earned wages in April, 1982, in retaliation for their refusal to sail in violation of Coast Guard manning requirements. The Complaint further alleged that as a consequence of the pendency of this initial wage claim for four hours of earned wages, in August, 1983 the petitioners exercised their

customary right as seamen to sign "under protest" a waiver and general release of claims upon which the City of New York, pursuant to New York State Labor Law, conditioned the receipt of a wage increase retroactive to January 1, 1982, negotiated with District Council 37 on behalf of the seamen's local (the Waiver is reproduced in the Appendix hereto, *infra* at p. 47a). As a consequence of petitioners' signing "under protest," the City of New York recouped all wage increases paid to Harding, Glussich and Winchester under the 1982-1983 wage agreement and has refused to the present time to pay this wage increase to the petitioners. Petitioners' claim for four hours of earned wages became a question of substantial monetary loss, giving rise to the issue of whether the City or State of New York has the right to impose a waiver and general release on the seamen in its employ as a condition for the receipt of earned wages and whether the waiver impermissibly deprived the seamen of their access to court to redress their grievances, in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution. The District Court erroneously treated these questions as a matter of New York State law.

The original Complaint and the Complaint filed by petitioner Thaxter on August 2, 1988, also challenged the City of New York's imposition of a "Holiday Bank," allegedly pursuant to an "understanding" with the petitioners' local union, after the City adopted an irregular work week, whereby the payment of wages to seamen who worked during a holiday week was eliminated in favor of the accrual of "time" as a cost-saving device. Since federal maritime law prohibits deductions and setoffs from earned wages except as enumerated by federal statute, Title 46 U.S.C. §599, petitioners challenged the legality of this device to eliminate earned wages, regardless of whether the issue was a subject of collective bargaining, and sought an accounting of all wages unlawfully deducted as a result of the "Holiday Bank" as well as penalty wages.

The respondents filed a Motion to Dismiss the Complaint or for Summary Judgment primarily on the ground that petitioners were limited to state law remedies as set forth

in Section 220 of New York State's labor law. The District Court dismissed Counts 1 through 3 of the Complaint by erroneously applying Section 10504 of revised Title 46 to petitioners' claims for earned wages and penalty wages, even though Petitioners' claims arose prior to the passage of that statute on August 26, 1983.[1] Petitioners' civil rights claim was dismissed solely by reference to New York State law rather than to federal law.

The only cause of action which the District Court did not dismiss concerned the "Holiday Bank" because there were substantial factual issues concerning the City's institution, dissolution and reinstatement of the "Holiday Bank." None of these factual issues were decided by the District Court. In its opinion and order dated February 3, 1989, having found that Title 46 U.S.C. §596 applied to the "Holiday Bank" wage claims, the District Court, *sua sponte* gave the City of New York leave to renew its Motion to Dismiss on the ground that Title 46 U.S.C. §596 would not apply to petitioners' claims for penalty wages because the vessels did not travel "port to port." In its next opinion, dated March 8, 1989, the District Court granted the Motion to Dismiss upon a finding that the petitioners did not engage in "coasting voyages" as required by Title 46 U.S.C. Section 596. In its final opinion, dated November 1, 1989, the District Court granted the City of New York's Motion to Dismiss for lack of subject matter jurisdiction, ostensibly without prejudice to petitioners' right to resubmit their claims concerning the "Holiday Bank" to the District Court after exhaustion of their alleged remedies under the union's collective bargaining agreement with the City of New York. The District Court never addressed the issue of the City's

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[1] Although §596 was repealed by virtue of the revisions to Title 46, it applied to Petitioners' claims which arose prior to the effective date of the amended statute. Title 1 U.S.C. §109; *Chung Yong Il v. Overseas Navigation Co., Ltd.*, 774 F.2d 1043 (11th Cir. 1985), cert. denied. 475 U.S. 1147 (1986) (Justice White dissenting); *Bennett v. New Jersey*, 461 U.S. 773 (1985).

unlawful deductions from earned wages in violation of Title 46 U.S.C. §599.

Petitioners' appeal to the United States Court of Appeals for the Second Circuit addressed two main issues: (1) the failure of the District Court to award the statutory penalty mandated by Title 46 U.S.C. §596 and (2) the refusal of the District Court to exercise jurisdiction over the petitioners' claims for earned wages in light of §599 and its reliance on New York State labor law as the basis for its decisions.

The Court of Appeals agreed with the District Court's holdings and adopted its opinions without giving the significant preemption issues raised by the petitioners the full attention these issues deserve. In so doing, the Court of Appeals abdicated the traditional role of the federal courts as the protector of seamen and disregarded the plain language of the federal seamen's statutes in order to defeat petitioners' bona fide claims for earned wages despite the remedial purpose of the seamen's statutes and the preemption of federal maritime law over inconsistent state law.

## REASONS FOR GRANTING THE WRIT

### I.

**THE COURT OF APPEALS' ADOPTION OF THE DISTRICT COURT'S DECISION THAT IT LACKED SUBJECT MATTER JURISDICTION TO DECIDE THE CLAIMS OF PETITIONERS FOR THEIR EARNED WAGES HAS FAR REACHING CONSEQUENCES FOR EVERY AMERICAN SEAMAN. THIS DETERMINATION VIOLATES THE FUNDAMENTAL PRINCIPLE OF UNIFORMITY OF MARITIME LAW AND CONFLICTS WITH THIS HONORABLE COURT'S DECISIONS ON THE STATUS OF SEAMEN, WARRANTING THE EXERCISE OF THIS COURT'S POWER OF REVIEW.**

The Court of Appeals' rejection of Petitioners' seamens' complaints for earned wages directly conflicts with the decisions of this Honorable Court concerning the supremacy of federal maritime law over inconsistent state law. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), *Workman v. City of N.Y.*, 179 U.S. 52 (1900); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). The Court's decision thus violates the principle of uniformity which has governed our admiralty law for two hundred years and which has historically provided the basis for this Court's decisions upholding the rights of seamen against inconsistent state law or illegal collective bargaining agreements. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Isbrandtsen Co. v. Johnson*, 343 U.S. 799 (1952); *American Foreign S S Co. v. Matisse*, 423 U.S. 150 (1975). The dismissal of the Petitioners' Complaints, which challenged the legality of a New York State law requiring seamen to individually sign a waiver of wage claims and a general release of all claims as a condition for receiving a wage increase under a municipal collective bargaining agreement, demonstrates further a radical departure from the prevailing treatment by this Court and other Courts of Appeals of seamen as wards in admiralty and thus requires the exercise of this Court's power of review.

By adopting the District Court's opinions, decided on the basis of New York labor law, rather than on federal maritime law, the Second Circuit has rendered a decision which also departs from its previous commitment to the protection of seamen, *Pariser v. City of New York*, 146 F.2d 431 (1945), and which creates a disparity in the remedies available to seamen based on whether they are unionized and by whom they are employed. Petitioners respectfully submit that the imposition of these criteria for determining whether a federal court has jurisdiction to hear a seaman's complaint for earned wages destroys the fundamental nature of maritime law, deprives seamen of their status as wards in admiralty and violates the well-settled principle that federal maritime law governs all matters of substance where a cause of action arises under maritime law, especially concerning seamen's wages and releases. *Garrett v. Moore-McCormack Co., supra; Whaley v. Rydman*, 887 F.2d 976 (9th Cir. 1989). The decision is contrary to this Honorable Court's holding in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971), which preserves the right of individual seamen to seek a resolution in federal courts of their wage claims, a right anciently established and extending even to foreign seamen despite collective bargaining agreements requiring the application of foreign law in foreign forums. *Putnam v. Lower*, 236 F.2d 561 (9th Cir. 1950); *Galon v. Hira II*, 1990 A.M.C. 342 (W.D. Wash. 1990).

The Petitioners' claims, as in *U.S. Bulk Carriers, Inc. v. Arguelles, supra.*, are not based merely on contract, but rather on statute and general maritime law which recognizes that a seaman's right to wages, like his right to maintenance and cure, springs from his relationship to the ship, creating an unconditional maritime lien, even in the absence of a contract. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); *Monteiro v. Sociedad Maritima San Nicholas, S.A.*, 280 F.2d 568 (2d Cir. 1960); cert. denied 364 U.S. 915; *Chung, Yong Il. v. Overseas Navigation Co., Ltd., supra.* Under federal maritime law, neither earned wages, unearned wages nor maintenance and cure may be contractually abrogated. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932); *Dowdle v. Offshore*

*Express, Inc.*, 809 F.2d 259 (5th Cir. 1987); *Vitco v. Joncich*, 130 F.Supp. 945 (S.D. Cal. 1955), aff'd 234 F.2d 161 (9th Cir. 1956). Nor does federal maritime law countenance waivers as a condition for the receipt of earned wages. *Nelson v. Moore-McCormack Lines, Inc.* 297 F.2d 936 (2d Cir. 1962). Yet this is precisely the result condoned by the Courts below in direct conflict with both the Ninth and Fifth Circuits.

Treating Petitioners as unionized civil service employees rather than as wards in admiralty, the Southern District of New York and Second Circuit have contravened the maritime law of the United States in a bold-faced attempt to reduce maritime law solely to a matter of contract when seamen are unionized. In so doing, the Court of Appeals has impermissibly allowed the City and State of New York to exercise maritime jurisdiction, raising an issue of substantial importance for all American seamen who may be similarly affected by the application of state labor laws and by unionized seamen who will be limited to contractual remedies and lose their traditional access to federal court. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

The Southern District of New York's delegation of maritime jurisdiction to the state directly conflicts with the Central District of California's recent opinion in *Pacific Merchant Shipping Association v. Aubrey*, 709 F.S. 1516 (C.D. Cal. 1989), currently pending before the Ninth Circuit, wherein that Court held that the State of California could not apply its overtime provisions to seamen and other maritime employees because state labor laws are preempted by federal admiralty law insofar as they purport to regulate wages, hours and working conditions. The decision demonstrates the continued vitality of *Southern Pacific v. Jensen, supra.*, this Court's landmark decision which held that Congress may not constitutionally delegate maritime jurisdiction to the states because it would destroy the uniformity of maritime law. In the interests of uniformity of maritime law and in the interests of uniformity of remedies available to seamen in the prosecution of their wage claims, we urge the Court to hold

that the federal courts alone have jurisdiction to decide the wage claims of American seamen and that these claims must be decided, not by state labor law, but pursuant to federal maritime law.

II.

**THE GROWING TENSION BETWEEN FEDERAL MARITIME LAW AND NATIONAL LABOR LAW POLICY IS REFLECTED IN A SPLIT AMONG THE CIRCUITS OVER WHETHER UNIONS MAY WAIVE THE STATUTORY AND COMMON LAW RIGHTS OF ITS MEMBER SEAMEN. THIS ISSUE IS OF SUBSTANTIAL IMPORTANCE TO THE MARITIME INDUSTRY OF THE UNITED STATES AND REQUIRES RESOLUTION BY THIS HONORABLE COURT.**

There are numerous affirmative legal duties and obligations imposed upon the relationship between seaman and shipowner. As a noted commentator has stated: "Although these affirmative duties and remedies have different origins and involve slightly different principles, they all obtain from the general maritime law of the United States and serve the singular object of protecting the seaman and indemnifying him for his afflictions," citing *Reyes v. Vantage S.S. Co., Inc.*, 609 F.2d 140 (5th Cir. 1980); 1 B *Benedict on Admiralty*, §30 (6th ed. 1976) and §51 (1982 ed.).[2]

The shipowner's duty to pay wages, like the duties to pay maintenance and cure and to provide a seaworthy vessel, imposed upon the shipowner by the law itself, arise out of the seaman's relationship with the vessel. Norris, *The Law of Seamen*, Vol. I, §299 (3d Ed. 1970). Although this Honorable Court has held that the obligation to provide a seaworthy vessel cannot be delegated or contracted away, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the analogous rights to wages and maintenance are the subject of a continuing battle to determine whether and to what extent labor laws preempt the federal maritime law.

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[2] Martin J. Jarvis, *The Progeny of Eight is Not Enough--Current Status of Maintenance and Cure (Admiralty Law in Collision with Labor Law)*, Address to the Admiralty Section, Association of Trial Lawyers of America, Chicago, August, 1985.

This Honorable Court has rejected the argument that the contemporary reality of unionized seamen negates the historical reasons for a seaman's ancient rights, and converts these rights into a purely contractual responsibility. *U.S. Bulk Carriers, Inc. v. Arguelles, supra.* Nor has Congress been convinced that a seaman's traditional rights must give way to this alleged new reality as demonstrated by the continued protections set forth in revised Title 46 U.S.C. However, in both this case and the plurality opinion in *Kowalik v. General Marine Transport Corp.*, 550 F.2d 770 (2d Cir. 1977) (Judge Mansfield dissenting), cert. denied 434 U.S. 830 (1978), the Second Circuit has so narrowly construed a seaman's right of access to the federal courts to claim his earned wages, that four American seamen have been limited to remedies under a collective bargaining agreement to which national labor laws do not even apply.[3] Although this Court declined to review the *Kowalik* decision, the issue of whether a federal maritime remedy may be converted into a purely contractual one is now a recurring matter which is ripe for review by this Court.

Recognizing that ancient maritime rights are different than contractual rights and closely adhering to this Court's traditional solicitude for seamen as wards in admiralty, the Third Circuit has held that a seaman is not bound by the rate of maintenance fixed in a collective bargaining agreement, but may apply to the federal court for a rate congruent with his actual living expenses, in accordance with general maritime law. *Barnes v. Andover Company*, 900 F.2d 630 (3d Cir. 1990). The Third Circuit rejected the Ninth Circuit's approach in *Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943 (9th Cir. 1986), cert. denied 479 U.S. 924 (1987), wherein the plurality concluded that although federal labor statutes have not preempted federal maritime law, where there is *quid pro quo* bargaining between the union and the employer, the rate of

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[3] The City of New York is not a statutory employer under the Labor Management Relations Act, Title 29 U.S.C. §152.

maintenance established in the collective bargaining agreement should not be disturbed.[4]

The broader issue implicit in this conflict is whether a union may waive either the statutory or general maritime rights of its member seamen so as to deprive seamen of their historical access to the federal courts for resolution of their claims. In light of the present conflict, similar to the question of Jones Act seaman status pending before this Court in *McDermott International, Inc. v. Wilander*, No. 89-1474, cert. granted June 18, 1990, the remedies available to American seamen and their access to federal Court will depend on the fortuity of geographic location rather than the uniformity of federal maritime law if this Court does not resolve the question.

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[4] As noted by the Third Circuit, the Fifth Circuit has implicitly held that the contract rate is not binding. *McWilliams v. Texaco, Inc.*, 781 F.2d 514 (5th Cir. 1986). Two Circuits follow the majority opinion in *Gardiner*. See *Macedo v. F/V Paul & Michelle*, 868 F.2d 519 (1st Cir. 1989); *Al-Zawkari v. American Steamship Co.*, 871 F.2d 585 (6th Cir. 1989).

## III.

## TITLE 46 U.S.C. §596, A REMEDIAL STATUTE, MUST BE ENFORCED AS WRITTEN BY CONGRESS, AND SHOULD NOT BE REWRITTEN BY THE COURTS IN ORDER TO DEFEAT ITS PURPOSE.

The maritime law throughout its history has made the ordinary seaman a member of a favored class--a ward in admiralty. Through its legislation, Congress has shown its solicitude toward seamen which requires the courts to liberally construe the wage statutes in favor of seamen. *U.S. v. Bulk Carriers, Inc., supra; Isbrandtsen Co. v. Johnson, supra.* The narrow interpretation of the term "coasting voyage" in the Courts below rewrites §596, is contrary to this Court's interpretation of the statute in *Griffin v. Oceanic Contractors, Inc., supra.*, and defeats the remedial purpose of the legislation.

There are many kinds of vessels which go to sea without going from port to port but from a coastal point to a point beyond the three mile territorial limit. None of these vessels were excluded from §596 except fishing or whaling vessels and yachts. Although Congress used the term "port to port" in Section 574 from which Section 10501 of the revised Shipping Code expressly derives, other Circuits have uniformly declined to imply a term excluded in one part of a statute which has been carefully employed in another part of that statute. *United States v. Wong Kim Bo*, 472 F.2d 720 (5th Cir. 1972); *National Insulation Transportation Committee v. I.C.C.*, 683 F.2d 533 (D.C. Cir. 1982); *Lankford v. Law Enforcement Assistance Administration*, 620 F.2d 35 (4th Cir. 1980). The Congressional intent to exclude the "port to port" requirement from Section 596 in favor of the broader term "coasting voyages" should not be defeated. A judicial interpretation which permits the Court to effectively rewrite the statute departs from the historic judicial function of effectuating the purpose and spirit of the law and demonstrates that the exercise of this Court's power of supervision is needed in the interest of justice.

## CONCLUSION

The imposition of state law on the fundamental maritime right of seamen to their earned wages violates the Constitution of the United States and has far reaching consequences for every American seaman. The issues presented to this Court regarding the jurisdiction of the federal courts to determine the statutory and general maritime rights of seamen in light of inconsistent state law and to decide the legality of collective bargaining agreements which waive those rights are ripe for review, not only because of the conflict between the Circuits but also because the decisions below defeat the intent of Congress to protect seamen and destroy the uniformity of federal maritime law.

The manifest importance of uniformity of the maritime law is deeply embedded in our history and, most recently, is the critical issue pending before this Honorable Court in *McDermott International, Inc. v. Wilander* wherein a uniform definition of "seaman" in the application of the Jones Act, is sought. Similarly, Petitioners ask this Court to determine whether the status of seamen as wards in admiralty requires uniformity not only in the resolution of wage claims but also in the determination of whether a collective bargaining agreement unlawfully abrogates important maritime rights and remedies.

The Court's decision in this case will affect the rights of all unionized seamen. Petitioners respectfully move the Court to grant a Writ of Certiorari to resolve the very substantial questions presented.

Respectfully submitted,

BERNARD ROLNICK
*Attorney for Petitioners*
*Counsel of Record*

JANE R. GOLDBERG
*Of Counsel*

## APPENDIX

## ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 18th day of June, one thousand nine hundred and ninety.

Filed June 18, 1990

No. 89-9248

WILLIAM HARDING, WILLIAM WINCHESTER, ALDO GLUSSICH, RICHARD E. THAXTER, JR.,

Plaintiffs-Appellants,

v.

THE CITY OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL PROTECTION); EDWARD O. WAGNER, JAMES M. HARRELL, EUGENE S. EGAN AND JAMES F. HANLEY,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiffs-appellants, William Harding, William Winchester, Aldo Glussich and Richard E. Thaxter, Jr.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
Clerk

## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

N.B. This Summary Order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in related cases before this or any other court.

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of May, one thousand nine hundred and ninety.

Filed May 8, 1990

89-9248

Present:

HONORABLE THOMAS J. MESKILL,

HONORABLE RICHARD J. CARDAMONE,

HONORABLE LAWRENCE W. PIERCE,

Circuit Judges.

WILLIAM HARDING, WILLIAM WINCHESTER, ALDO GLUSSICH, RICHARD E. THAXTER, JR.,

Plaintiffs-Appellants,

v.

THE CITY OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL PROTECTION); EDWARD O. WAGNER, JAMES M. HARRELL, EUGENE S. EGAN AND JAMES F. HANLEY,

Defendants-Appellees.

This is an appeal from judgments entered in the United States District Court for the Southern District of New York, Conner, J., dismissing plaintiffs-appellants' claims for seamen's wages and penalties pursuant to 46 U.S.C. §596 and of violations of their constitutional rights pursuant to 42 U.S.C. §1983.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgments of the district court are AFFIRMED substantially for the reasons stated in the district court's Opinion and Order dated May 20, 1988, its Opinion and Order dated February 3, 1989 and reported at 704 F.Supp. 531 (S.D.N.Y. 1989), its Opinion and Order dated March 8, 1989 and reported at 707 F.Supp. 757 (S.D.N.Y. 1989), and its Opinion and Order dated November 1, 1989 and reported at 724 F.Supp. 1129 (S.D.N.Y. 1989).

s/ Thomas J. Meskill
THOMAS J. MESKILL

s/ Richard J.Cardamone
RICHARD J. CARDAMONE

s/ Lawrence W. Pierce
LAWRENCE W. PIERCE
Circuit Judges.

**OPINION AND ORDER**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Civ. 4013
(WCC)

WILLIAM HARDING, et al.,

Plaintiffs,

- against -

CITY OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL PROTECTION), et al.,

Defendants

APPEARANCES:

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THOMAS CRANE, ESQ.
NEAL McNAMARA, ESQ.
Assistants Corporation Counsel
Of Counsel

Conner, D.J.,

Plaintiffs are seamen employed by the City of New York. They have brought this suit (1) to recover wages, allegedly earned but unpaid, together with interest and penalties, pursuant to 46 U.S.C. § 10504 (1983), and (2) seeking damages for the alleged violation of their constitutional rights pursuant to 42 U.S.C. §§ 1983 and 1985. Defendants have moved to dismiss the complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P., for failure to state a claim upon which relief may be granted or, in the alternative, for summary judgment pursuant to Rule 56, Fed.R.Civ.P. For the reasons set forth below, defendants' motion for summary judgment is granted on Counts 1, 2 and 3 of the complaint, but is denied as to Count 4. Defendants' motion to dismiss is granted on Count 6. Plaintiffs are given leave to amend their complaint to include additional causes of action under state law.

Background

Plaintiffs are employees of the Department of Environmental Protection ("DEP") of the City of New York who work in various capacities on sludge boats operated by DEP. The boats operate within New York and possibly New Jersey and bring sludge to a dump site twelve miles off-shore. Plaintiffs are "Section 220" or "prevailing rate", employees and, pursuant to section 1173.5.0 of the New York City Collective Bargaining Law, are represented by a duly authorized employee organization, Local 2906 of District Counsel 37 of the American Federation of State, County and Municipal Employees. As § 220 employees, plaintiffs have the option of having their wages and benefits established pursuant to New York State Labor Law § 220 rather than through collective bargaining in the form of either wage agreements or compromise determinations.

Under Section 220, the union representing the employees may file a complaint with the Comptroller of the City of New York requesting the Comptroller to determine

whether the employees are being paid a rate of wages and provided supplemental benefits not less than the rate of wages paid and the level of supplements provided to similarly employed individuals in private industry. After a complaint is filed, the City and Section 220 employees, through their union, may negotiate wages and benefits, and may enter into formal consent agreements known as "Compromise Determinations" which embody the terms of a wage settlement. Compromise Determinations, when ratified by the Comptroller, have binding force and effect under the Labor Law, but traditionally grant individual employees the right to reject their terms by filing an appropriate notice with the Comptroller within 30 days of issuance.

If the union rejects a proffered Compromise Determination it may then pursue the procedures set out in Labor Law § 220, whereby the prevailing wages and supplements are litigated before the "fiscal officer" of the governmental entity, -- defined in New York City to be the City Comptroller. Ultimately, a determination of what constitutes prevailing rate of wages and supplements applicable to the complainant is issued.

On September 12, 1983, District Council 37 entered into an agreement with defendant City of New York on behalf of Local 2906 which provided for increased wages for sludge boat crews for the period from January 1, 1982 through December 31, 1983. Prior to legislation enacted in 1984, under Section 220, employees then had the choice to settle for the agreed wages or to litigate. If they chose to settle, they were required to waive their right to litigate as part of the bargain. The waiver was included to protect the City from being subject to subsequent claims concerning the very issue which the compromise determination was intended to resolve. Without such a waiver, employees would be free to challenge a collective bargaining agreement at any time during the life of the agreement, thus depriving the city of the certainty they sought by entering into the wage agreement. To avoid this potential problem, District Council 37 agreed on behalf of its members that each individual covered by the new wage

agreement with the city would sign a waiver of their right to litigate under Section 220.

Discussion

In the first three counts of the complaint, plaintiffs allege that the provisions of 46 U.S.C. § 10504 entitle, them to certain penalties and interest on wages that they allege were wrongfully withheld from them by defendant. Even if the Court were to accept as true plaintiffs' allegation that their wages were wrongfully withheld, the statute upon which plaintiffs rely does not apply to the vessels on which plaintiffs work. 46 U.S.C. § 10501 "applies to a vessel ... on a voyage between a port in one State and a port in another State (except an adjoining state)." According to defendants, the vessels in question operate within New York Harbor and sail twelve miles out to sea and back; they do not operate between different parts, much less between ports in non-adjoining states. See Affidavit of John Chen at 2. Therefore, the provisions of 46 U.S.C. § 10504 do not apply here. Moreover, even if as plaintiffs assert the vessels in question are authorized to travel on a route from Fire Island, New York to Barnegat Inlet, New Jersey, the statute still does not apply because it does not call at ports in both states and because those two states are adjoining.

Therefore, plaintiffs' first, second, and third claims fail to state a claim upon which relief may be granted and must be dismissed. In the first three counts, plaintiff also asserts that their complaint alleges violations under federal law "and under the laws of the State of New York." Plaintiffs have failed, however, to specify which state laws provide a basis for the relief they request. In the interests of justice, the Court grants plaintiffs leave to amend their complaint to identify these laws.

Count 4 of the complaint alleges that the city has failed to pay any monies owing to plaintiffs for overtime holiday work during 1982-84. Plaintiffs and defendant have submitted conflicting affidavits regarding the holiday bank, and the Court cannot resolve the factual inconsistencies without hearing live

testimony. Accordingly, the motion for summary judgment on Count 4 is denied.

Count 6 of the complaint (there is no Count 5) alleges that defendants have intentionally violated plaintiffs' civil rights through a policy of requiring plaintiffs to waive their statutory rights under the laws of New York as a condition of receiving wage increases pursuant to a collective bargaining agreement. Plaintiffs allege that such a policy amounts to a deprivation of property without due process of law. This claim is meritless.

It is well settled that "parties in voluntary agreement are not limited, except for rare matters contrary to public policy, from agreeing to anything they wish." Mount St. Mary's Hospital v. Catherwood, 26 N.Y.2d 493, 311 N.Y.S.2d 863, 260 N.E.2d 508 (1970). Even constitutional rights can be waived in most situations. Gardner v. Broderick, 392 U.S. 273 (1968); Matter of Lee v. County Court of Erie County, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452, cert. den. 404 U.S. 823 (1971). In Antinore v. State, 49 A.D.2d 6, 371 N.Y.S.2d 213 (4th Dept. 1975), an employee sought a declaration that a collective bargaining agreement, which provided for binding arbitration in lieu of an Article 78 proceeding as the method of disposing of challenges to disciplinary action addressed to an employee, was unconstitutional. Citing well settled precedent, the Appellate Division found that "due process requirements -- and we think equal protection as well -- are not relevant when they have been waived by the party seeking to assert them, as by voluntarily entering into an agreement for the resolution of disputes in a manner which dispenses with one or more of the rights constitutionally guaranteed." Antinore, 371 N.Y.S.2d at 216.

Here, if plaintiffs wanted to share in the wage increase provided by the agreement, they were required to sign the waiver. If they did not wish to waive their rights, they had the option of filing a complaint with the Comptroller petitioning him to determine the prevailing rate of wage. If in Antinore

there was no constitutional infirmity found in the collective bargaining agreement, then a fortiori there is none here where, unlike the situation in Antinore, the waiver is not automatically imposed on plaintiffs as part of the collective bargaining agreement. Here, plaintiffs have the added option of contesting the collective bargaining agreement by filing a complaint with the Comptroller. Moreover, the rights which plaintiffs are asked to forego by signing the waiver not to litigate in this case are directly related to a benefit which they receive, unlike the waiver of rights in Antinore. It is clear, therefore, that the collective bargaining agreement does not violate plaintiffs' civil rights. Accordingly, Count 6 of the complaint is dismissed.

For the reasons outlined above, defendants' motion is granted as to Counts 1, 2, 3 and 6, and denied as to Count 4. Plaintiffs are given leave to file an amended complaint within 30 days setting forth more particularly their claims, if any, under New York state law.

So ordered.

s/William C. Conner
WILLIAM C. CONNER
United States District
Judge

Dated: New York, New York
May 20, 1988

OPINION AND ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 5365
(WCC)

RICHARD E. THAXTER, JR.,

Plaintiff,

- against -

THE CITY OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL PROTECTION),

Defendant.

APPEARANCES:

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GRACE GOODMAN, ESQ.
GEORGIA PESTANA, ESQ.
Assistants Corporation Counsel
Of Counsel

Conner, D.J.:

Plaintiff Richard E. Thaxter, Jr. ("Thaxter") is a seaman employed by the City of New York (the "City"). He brings this suit (1) to recover wages, allegedly earned but unpaid, together with interest and penalties, and (2) seeking damages for the alleged violation of his constitutional rights pursuant to 42 U.S.C. §§ 1983 and 1985. Defendant has moved to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim upon which relief may be granted or, in the alternative, for summary judgment pursuant to Rule 56, Fed. R. Civ. P. The motion is granted in part, and denied in part.

BACKGROUND

Plaintiff was employed by defendant as a Chief Marine Engineer on sludge vessels operated by the City. Sludge vessels operate within New York Harbor and carry sludge to a dump site twelve miles offshore. They do not operate between ports. Affidavit of John Chen ¶ 4.

Thaxter's first cause of action is for unpaid wages and penalties. Plaintiff alleges that in September, 1982, the City created a "Holiday Bank" savings plan, in which it deposited the overtime wages earned by seamen who work on sludge tankers during their holidays. Thaxter claims that, although the Holiday Bank was terminated on October 15, 1983, the City never accounted for his accumulated overtime wages. Plaintiff demands that the City pay him these wages with interest, as well as penalties, which plaintiff maintains are appropriate under federal law.

Defendant responds that plaintiff, through his union, agreed not to assert any claim for wages placed in the Holiday Bank. Edward 0. Wagner, an Assistant Commissioner of the City's Department of Environmental Protection, states that in December 1986, an informal agreement was reached between defendant and Local 2906 of District Council 37 pursuant to which union members would give up their right to their

balances remaining in the Holiday Bank in return for the City's promise to forgo collection of excessive payments of overtime wages from October 16, 1983 to December 16, 1986. Affidavit of Edward 0. Wagner ¶ 6.

Plaintiff replies that his Union did not agree to such an arrangement. In support of this contention, plaintiff submits a union officer's statement: "At the Oct '86 meeting with [the City] Department and Union Reps. present, I was in attendance as an Executive Board member [of the union]. No agreements were reached." Affidavit of James F. Tobin.

Thaxter's second cause of action alleges a breach of his constitutional rights under 42 U.S.C. §§ 1983 & 1985. Specifically, he alleges that, as a prerequisite to entering into any collective bargaining agreements with his union, the City required that union employees waive their rights under New York Labor Law § 220.

Until 1984, "Section 220" or "prevailing rate" employees, such as plaintiff, had the option of having their wages and benefits established pursuant to Section 220, by filing a complaint with the Comptroller of the City of New York, rather than through collective bargaining procedures. According to the City, if it had accepted a collective bargaining agreement without requiring waivers, employees would be free to challenge the agreement at any time, and the City would be deprived of the certainty it sought by entering into the wage agreement. See Affidavit of James F. Hanley ¶¶ 6 & 9. Defendant insists that there is nothing improper about its policy requiring such waivers.

This action is related to Harding v. City of New York, No. 86 Civ. 4013 (WCC) (S.D.N.Y.). The three seaman who brought the Harding case were also employees on the City's sludge boats. They assert essentially the same claims that plaintiff Thaxter advances in his suit. The two cases are scheduled to be tried together in March.

Last year, defendant made a motion similar to this one in the Harding case. In May, I dismissed plaintiffs' civil rights claims for lack of merit, and granted defendant summary judgment on plaintiffs' claim for penalties, noting that defendant's vessels are not governed by 46 U.S.C. § 10504 since they do not "voyage between a port in one State and a port in a [non-adjoining] State." Harding v. City of New York, No. 86 Civ. 4013 (WCC), Slip Op. at 5 & 8 (S.D.N.Y. May 20, 1988) (quoting, 46 U.S.C. § 10501).

DISCUSSION

Defendant asks that this Court to (1) dismiss Thaxter's claim for penalties as barred by 46 U.S.C. § 10501; and (2) dismiss the civil-rights claims as either time-barred or meritless. Only the second cause of action will be dismissed at this time.

The Holiday Bank Claim

Defendant-argues that plaintiff's claim for penalties on the allegedly unpaid wages is barred by 46 U.S.C. § 10501. That statute limits the applicability of 46 U.S.C. § 10504, which penalizes vessel owners who do not pay wages on time, to vessels "on a voyage between a port in one State and a port in another [non-adjoining] State." Defendant's Brief at 11-12; see also Harding, No. 86 Civ, 4013 (WCC), Slip Op. at 5.

Plaintiff correctly responds that Thaxter's claim is not based on Section 10504; it is grounded in that provision's predecessor, 46 U.S.C. § 596. Plaintiff adds that Section 596 did not contain a port-to-port limitation. Defendant did not file a reply brief or otherwise dispute this contention. Since plaintiff's position is not patently meritless, defendant's request for a dismissal will not be granted at this time.

Plaintiff's claim is clearly governed by Section 596. Thaxter's claim arose prior to the adoption of Section 10504 on August 26, 1983. Section 10504 does not specify that it should be given retroactive effect. It may therefore be

presumed, especially since defendant has not suggested otherwise, that the statute became effective on the date of its enactment. Chung, Young Il v. Overseas Navigation Co. Ltd., 774 F.2d 1043, 1045 n.2 (11th Cir. 1985) ("Under the terms of the repealing statute . . . this case is still governed by old section 596 since the claim involved here matured prior to the passage of the repealing statute."), cert. denied, 475 U.S. 1147 (1986); c.f. United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982).

On the other hand, plaintiff's contention that Section 596 is not limited to vessels traveling from port to port is apparently wrong. The statute provides in pertinent part:

> The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens . . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court . . . .

46 U.S.C. § 596 (emphasis added).

Thaxter maintains that the City's sludge boats, which operate within New York Harbor and carry sludge to a dump site twelve miles offshore, make "coasting voyages" within the meaning of Section 596. The best authority that plaintiff cites for this proposition is the judicial silence of Dendrinos v. City of New York, 86 F. Supp. 688 (S.D.N.Y. 1949). The vessel involved in Dendrinos was precisely the kind involved in this case. "The work of the vessel consisted of carrying sludge and waste from the sewage disposal plants of the City, out of New

York Harbor to a dumping ground about 10 miles out to sea half of the work being carried on within the water of the harbor and the other half in the open waters outside." Id. at 689. The Dendrinos court found the statute inapplicable on the ground that the City had "sufficient cause" to withhold the wages. Id. at 690. The question of whether the sludge vessel was making "coasting voyages," however, was not discussed.

Another case cited by plaintiff, however, holds that a "coasting voyage" is a trip that starts at one part and ends at another:

> The first question to be decided is whether Carson was employed on a "vessel making coasting voyages," and therefore entitled to the penalties prescribed by the statute. . . . Webster's New International Dictionary, Second Edition, defines "coasting" as an "act or practice of sailing from port to port along a coast." Bouvier's Law Dictionary, Third Edition, defines "voyage" as "The passage of a ship upon the seas from one port to another, or to several ports . . . The actual transit of a vessel from port to port . . . Each trip constitutes a voyage . . . "

Carson v. Gulf Oil Corporation, 123 So.2d 35, 38 & 39 (Fla. App. 1960); see also Gardner v. The L.N. Danzler, 177 F. Supp. 736, 741-42 (E.D. Va. 1959), aff'd 281 F.2d 719 (4th Cir. 1960).

Although I am inclined to think that the port-to-port requirement in Section 10504 merely codified the case law interpreting the phrase "coasting voyages" in Section 596, it would be unfair to dismiss Thaxter's claim for penalties without affording him an opportunity to respond to this contention. If the City chooses to renew its motion for summary judgment on this ground, it may do so within one week. Plaintiff will have one week to respond, and the City, five days to reply.

Although plaintiff's claim for penalties may be vulnerable as a matter of law, Thaxter's claim for his Holiday Bank wages presents issues of fact to be resolved at trial. For, example, the parties have offered conflicting evidence as to whether Thaxter's union agreed to give up all claims to the balance in the Holiday Bank in return for the City's promise not to collect certain overpayments. As I noted in Harding, "the Court cannot resolve the factual inconsistencies [regarding the Holiday Bank] without hearing live testimony" Harding, No. 86 Civ. 4013 (WCC), Slip Op. at 6.

The Civil Rights Claims

Defendant argues that Thaxter's civil rights claims are timebarred and meritless. Plaintiff's brief does not discuss the statute of limitations issue, and only touches on the merits of his civil rights claims. I am persuaded that the claims are both untimely and meritless.

The Second Circuit has held that a three-year statute of limitations applies to civil rights actions brought under 42 U.S.C. §§ 1983 and 1985. Pauk v. Board of Trustees of the City University of New York, 654 F.2d 856, 866 (2d Cir. 1981), cert. denied, 455 U.S. 1000 (1982); Salahuddin v. Coughlin, 647 F. Supp. 49, 51 (S.D.N.Y. 1986). Such claims accrue "when the plaintiff knows or has reason to know of the injury which is the basis of his action. Singleton v. City of New York, 632 F.2d 185, 191 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981).

Plaintiff's claim, that the City 's policy of requiring waivers before accepting collective bargaining agreements infringed his civil rights, could not have arisen any later the 1984 amendment of Section 220 of the Labor Law, after which time individual waivers were no longer sought by the City. Thus, under the three-year limitation period, Thaxter's claim expired by the end of 1987. The complaint commencing this action was filed on August 2, 1988. Plaintiff's second cause of action must therefore be dismissed as untimely.

Thaxter's civil rights claims are also meritless. The claims are identical to those brought by the plaintiffs in Harding. I granted the defendant's motion to dismiss in Harding on the ground that the plaintiffs had waived their constitutional rights:

> Here, if plaintiffs wanted to share in the wage increase provided by the agreement, they were required to sign the waiver. If they did not wish to waive their rights, they had the option of filing a complaint with the Comptroller petitioning him to determine the prevailing rate of wage. If in Antinore there was no constitutional infirmity found in the collective bargaining agreement, then a fortiori there is none here where, unlike the situation in Antinore, the waiver is not automatically imposed on plaintiffs as part of the collective bargaining agreement.

Harding, No. 86 Civ. 4013 (WCC), Slip Op. at 7. Since Thaxter's claims are identical to those in Harding, they are dismissed for the reasons set out in that Opinion.

## CONCLUSION

For the reasons stated above, defendant's motion to dismiss the complaint for failure to state a claim, or in the alternative for summary judgment is granted in part, and denied in part. Defendant's motion to dismiss the first cause of action is denied, with leave to renew the motion. Defendant's motion to dismiss the second cause of action is granted.

/s William C. Conner
WILLIAM C. CONNER
United States District
Judge

Dated: February 3, 1989
New York, New York

**OPINION AND ORDER**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 5365
(WCC)

RICHARD E. THAXTER, JR.,

Plaintiff,

- against -

THE CITY OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL PROTECTION),

Defendant.

APPEARANCES:

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GRACE GOODMAN, ESQ.
GEORGIA PESTANA, ESQ.
Assistants Corporation Counsel

Of Counsel

Conner, D.J.:

On February 3, 1989, I denied defendant's motion to dismiss plaintiff's first cause of action "with leave to renew the motion." Thaxter v. The City of New York, 1989 U.S. Dist. LEXIS 899 at 11 (February 3, 1989). Although I was inclined to hold that "coasting voyages," as used in 46 U.S.C. § 596 (replaced by 46 U.S.C. § 10504), involve the transit of vessels from one port to another, I felt it would be unfair to dismiss plaintiff's claim for penalties without affording him an opportunity to brief the issue.

Defendant timely renewed its motion. After carefully examining the case law cited by both sides concerning the meaning of "coasting voyages," I now conclude that "the 'port-to-port' requirement in Section 10504 merely codified the case law interpreting the phrase 'coasting voyages' in Section 596." Thaxter, 1989 U.S. Dist. LEXIS 899 at 8. Thaxter's claim for penalties under 46 U.S.C. § 596 is accordingly dismissed.

Defendant's First Motion to Dismiss

Familiarity with the Court's February 3, 1989 Opinion is presumed. Defendant made its initial motion to dismiss the first cause of action on the ground that 46 U.S.C. § 10504, which penalizes vessel owners who do not pay wages on time, only applies to seamen "on a voyage between a port in one State and a port in another [non-adjoining] State." 46 U.S.C. § 10501. Plaintiff replied that his action is governed by Section 10504's predecessor, 46 U.S.C. § 596. I agreed. Thaxter, 1989 U.S. Dist. LEXIS 899 at 6.

Plaintiff also contended that Section 596 does not contain a port-to-port limitation. Although I believed that plaintiff was probably wrong, I noted that "[d]efendant did not file a reply brief or otherwise dispute this contention," and refused to dismiss plaintiff's claim at that time, since his position on Section 596 was "not patently meritless." Id. at 5.

On Reconsideration

Section 596 provides in pertinent part:

> The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens . . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court . . . .

46 U.S.C. § 596 (emphasis added).

All the authorities that have addressed the meaning of "coasting voyages" agree that this term of art refers to the passage of ships from one port to another. One case, cited by plaintiff in opposition to the initial motion, explained:

> The first question to be decided is whether Carson was employed on a "vessel making coasting voyages," and therefore entitled to the penalties prescribed by the statute.

Webster's New International Dictionary, Second Edition, defines "coasting" as an "act" or practice of sailing from port to port along a coast." Bouvier's Law Dictionary, Third Edition, defines "boyage as "The passage of a ship upon the seas from one port to another, or to several ports . . . The actual transit of a vessel from port to port . . . Each trip constitutes a voyage . . .

Carson v. Gulf Oil Corporation, 123 So. 2d 35, 38 & 39 (Fla. App. 1960); see also Gardner v. The L.N. Danzler, 177 F. Supp. 736, 741-42 (E.D. Va. 1959), ff'd 281 F.2d 719 (4th Cir. 1960).

In its papers opposing defendant's renewed motion, plaintiff cites discussions of the word "voyage" in Corpus Juris Secundum. Ironically, one definition cited by that treatise is "the actual transit of a vessel from port to port." 92 C.J.S. Voyage (1955). The treatise also notes that "short trips made by a tug from one body of water to another, merely furnishing the motor power to vessels themselves bound on a voyage" are not "coasting voyages." 79 C.J.S. Seamen § 3 (1974).

The definition cited by plaintiff from William Falconer's Universal Marine Dictionary (1784) does not support the proposition that sludge boats make "coasting voyages." That dictionary defines "coasting" as "the act of making a progress along the sea coast of any country." The use of the term "progress" suggests that coasting involves moving from one point on the coast to another, or, in other words, from one port to another.

Plaintiff once again cites Dendrinos v. City of New York, 86 F. Supp. 688 (S.D.N.Y. 1949), which involved a sludge vessel, in support of the proposition that sludge vessels make "coasting voyages." On my initial consideration of defendant's motion, I found Dendrinos unpersuasive because the court there did not discuss the "question of whether the vessel was making 'coasting voyages.'" Thaxter, 1989 U.S. Dist. LEXIS 899 at 7. Plaintiff nevertheless insists: "The 'silence' of these judges concerning the alleged 'port to port' requirement of Section 596 is easily understood. They read the plain language of the statute and did not try to read into the statute a limitation which does not exist." Plaintiff's Brief at 5. I decline to follow the silence of Dendrinos in light of the numerous authorities supporting defendant's position.

If Congress had intended to change the law substantively by enacting Section 10501, it should have explicitly indicated that the "port to port" language in the new section was a departure from the former phrase "coasting voyages." There is no indication of such an intent in the legislative history. I am persuaded that the sludge vessel in this case was not making a "coasting voyage" within the meaning of Section 596.

Conclusion

For the reasons stated above, defendant's motion to dismiss plaintiff's claim for penalties under 46 U.S.C. § 596 is granted. The parties are directed to prepare for trial on the "holiday bank" issue.

s/William C. Conner
WILLIAM C. CONNER
United States District
Judge

Dated: March 8, 1989
New York, New York

**OPINION AND ORDER**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Civ. 4013
(WCC)

WILLIAM HARDING, et al.,

Plaintiffs,

- against -

CITY OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL PROTECTION), et al.,

Defendants

88 Civ. 5365
(WCC)

RICHARD E. THAXTER, JR.,

Plaintiff,

- against -

THE CITY OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL PROTECTION),

Defendant.

APPEARANCES:

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Of Counsel

CONNER, D.J.:

This action is before the Court on the parties' joint request for judgment on submitted facts. See Fed. R. Civ. P. 83 (district courts may make local rules); General Rule 8 of the Rules of the Southern and Eastern Districts of New York (where no federal procedure exists, court may apply New York procedure); N.Y. Civ. Prac. L. & R. § 3222 (McKinney 1970) [hereinafter CPLR] (action on submitted facts). In rendering its judgment on submitted facts, the Court discovered the issue of exhaustion of contractual remedies. Realizing that its jurisdiction was in question, the Court requested that the parties fully brief the issue.[1] After a thorough inquiry into whether it may entertain this action, the Court now concludes that plaintiffs must first exhaust their contractual remedies under the collective bargaining agreement before invoking the jurisdiction of the Court. The action is therefore dismissed.

## BACKGROUND

Plaintiffs commenced these consolidated actions to recover allegedly earned but unpaid wages. Plaintiffs also sought interest and penalties pursuant to 46 U.S.C. § 10504 (formerly 46 U.S.C. § 596) of the Shipping Act. Plaintiffs further sought redress for alleged violations of their constitutional rights under 42 U.S.C. §§ 1983 and 1985.

In an unreported decision dated May 20, 1988, the Court dismissed the claims of plaintiffs Harding, Winchester and Glussich under 46 U.S.C § 10504 as well as their civil rights claims. Harding v. City of New York (Dep't of Environmental Protection), No. 86 Civ. 4013 (WCC). In a later decision, the Court dismissed plaintiff Thaxter's civil rights

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[1] Under the Federal Rules, Fed. R. Civ. P. 12(h) (3), arguments challenging the Court's subject matter jurisdiction may be raised at any time, by any party, or by the Court.

claims, but found that his claim under the Shipping Act was governed by § 596 rather than the revised § 10504 and denied the motion to dismiss that claim. Thaxter v. City of New York (Dep't of Environmental Protection), 704 F. Supp. 531 (S.D.N.Y. 1989). Still later, the Court, upon defendant's renewed motion for dismissal under § 596, found the provisions of § 596 inapplicable and dismissed Thaxter's claim. Thaxter v. City of New York (Dep't of Environmental Protection), No. 88 Civ. 5365 (WCC) (S.D.N.Y. March 8, 1989). In the earlier opinions, the Court denied defendant's motions for summary judgment with respect to plaintiffs' claims for unpaid wages because of factual inconsistencies which raised triable issues of fact.

## FACTS

Plaintiffs are certified American seamen, duly licensed by the United States Coast Guard. Plaintiffs were employed by the City of New York, Department of Environmental Protection (hereinafter "the City"), as Master and crew members aboard sludge vessels owned and operated by the City of New York. Prior to July 9, 1982, crew members aboard the City's sludge vessels were scheduled for eight-hour shifts, five days per week, totalling forty hours per week. Crew members in fact worked sixteen-hour shifts, three days one week and two days the next, for a total of eighty hours for two weeks. Plaintiffs were paid in cash at the overtime rate of time and a half for holidays. On July 9, 1982, the City instituted a thirteen-hour-and-twenty-minute work day, three days per week, for a total of forty hours per week.

As a result of the "irregular" work week, the City and plaintiffs' union, Local 2906 of District Council 37, American Federation of State, County and Municipal Employees (hereinafter "the Union"), agreed that leave-time, including holiday time, would be guided by the terms of Article VI of the City-Wide agreement regarding a holiday leave bank. Plaintiff Thaxter was president of Local 2906 at the time, and a

signatory to the agreement with the City. The agreement was subsequently ratified by the Union membership.

The provisions of the City-Wide contract created a holiday bank, which operated in terms of time, not cash, accumulating hours of leave to which employees were entitled. If an employee chose not to use the time accumulated in the holiday bank, he would be permitted to carry it over for use in future years. If not used, the holiday leave time would be converted into annual leave, and finally, to sick leave. Under this plan, no cash compensation was to be distributed. The effect of the holiday bank was to eliminate the payment of overtime wages during a holiday week to crew members. By crediting the employees with time, the City was essentially paying the normal compensation and not the premium rate.

After several meetings between the Union and the City concerning the crew members' dissatisfaction with the holiday bank, Edward Wagner, Deputy Commissioner of the Department and then Director of Bureau of Waste Water Treatment agreed to discontinue the holiday bank in October, 1983 and pay the computed overtime that was due to plaintiffs from July, 1982 to October, 1983. Pursuant to the agreement with Wagner, overtime wages were paid in cash for holiday time from October, 1983 until December, 1986, just as they had been prior to July, 1982. However, the City never paid the overtime wages allegedly due for the July, 1982 to October, 1983 period.

In December, 1986, the holiday bank was reinstated and overtime payments were again stopped pursuant to the original July, 1982 holiday bank agreement. The City claims that plaintiffs, through the Union, agreed not to assert any claim for wages placed in the holiday bank in return for the City's promise to forego collection of excessive payments of overtime wages from October, 1983 to December, 1986. Plaintiffs reply that no such agreement was reached.

## DISCUSSION

### Exhaustion

Plaintiffs' claims for earned wages derive from the employment contract between the Union and the City of New York. In support of its motion to dismiss for lack of subject matter jurisdiction, the City first contends that under federal law, plaintiffs are required to pursue their remedies under the collective bargaining agreement prior to invoking the jurisdiction of any court. The City further maintains that this labor dispute is governed by New York State General Municipal Law and New York State common law, thereby depriving the Court of federal jurisdiction. The City thus requests the Court to exercise discretion in dismissing this sole remaining pendent state claim.[2] After a full briefing by the parties, the Court concludes that the action must be dismissed because federal law requires plaintiffs to exhaust their contractual remedies before invoking the court's jurisdiction.

It is well settled that an employee may not bring suit against his employer for wages arising from a collective bargaining agreement until he has first exhausted any grievance and dispute resolution procedures set forth in the agreement. See Vaca v. Sipes, 386 U.S. 171, 184 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). This exhaustion doctrine, however, does not apply to suits for wages brought by seamen under 46 U.S.C. §§ 596 or 597. See Arguelles v. U.S. Bulk Carriers, Inc., 400 U.S. 351, 356-57 (1971).

The Supreme Court has held that a seaman is not procedurally barred from pursuing judicially his statutory

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[2] The City inaccurately categorizes plaintiffs' claims as pendent state claims. Because plaintiffs are United States Coast Guard seamen, their claims for earned wages fall within the Court's maritime jurisdiction pursuant to 28 U.S.C. § 1333.

right to the prompt payment of earned wages by a failure to utilize his collective bargaining agreement grievance procedure machinery. See Arguelles, 400 U.S. at 354; Lamont v. United States, 613 F. Supp. 588, 591 (S.D.N.Y. 1985). Affirming the decision of the Fourth Circuit, the Supreme Court stated that it could "find no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration were to take the place of the old shipping commissioners or to assume part or all of the roles served by the federal courts protective of the rights of seamen since 1790." Arguelles, 400 U.S. at 356. Therefore, notwithstanding the existence of a collective bargaining agreement, a seaman is entitled to seek redress in federal courts under 46 U.S.C. § 596, which permits him to sue directly for earned wages.

Nonetheless, plaintiffs'reliance on the Arguelles exception is misplaced because their claims for earned wages fall outside its confines. Arguelles does not apply to the case at bar because the plaintiffs may not seek wages under the statutory scheme that was scrutinized in that case, namely § 596.[3] As the Court concluded in its prior opinion for the determination of penalties, § 596 was unavailable because sludge boats do not make "coasting voyages" such to fall within the ambit of the section. Thaxter v. City of New York (Dep't of Environmental Protection), No. 88 Civ. 5365

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[3] Section 596 provides in pertinent part:

> The master or owner of any vessel making coasting voyages shall pay to every seamen his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens . . . .

46 U.S.C. § 596 (emphasis added). Nor does § 597 apply to plaintiffs' claims.

(WCC) Slip Op. at 3-5 (S.D.N.Y. March 8, 1989). For the same reason, § 596 is unavailable for the determination of wages in the present case. Thus, plaintiffs are left with a contract claim, albeit a maritime contract, to which the exhaustion doctrine applies and they must first seek administrative remedies under the collective bargaining agreement. See Kowalik v. General Marine Transport Corp., 550 F.2d 770 (2d Cir.), cert. denied, 434 U.S. 830 (1977); Camean v. F/V Lady Jay, 654 F. Supp. 709, 711-12 (D. Mass. 1985).

The City correctly relies on Kowalik v. General Marine Transport Corp., 550 F.2d 770 (2d Cir.) cert. denied, 434 U.S. 830 (1977). In Kowalik, the Second Circuit was faced with a similar case in which a seaman's claim for overtime wages was not grounded in 46 U.S.C. § 596. Thus, the plaintiff was unable to invoke Arguelles to bypass contractual grievance resolution steps and proceed directly against his employer in federal court.

Nevertheless, the plaintiff in Kowalik, like the plaintiffs in the present case, argued that the district court had jurisdiction to hear this claim under the seaman's traditional right to sue for his wages in federal court as a right deriving from Article III of the Constitution. The Second Circuit rejected the plaintiffs' argument, stating:

> The very concept of "wages" depends upon some agreement, expressed or implied, with respect thereto. Plaintiff here specifically delegated the Union to act on his behalf. Having done so, he should adhere to the method selected by him to determine 'wages.' Until that step is taken, it would seem premature to debate enforcement procedures.

Kowalik, 550 F.2d at 772.

The Second Circuit's reasoning is equally applicable here, especially to Thaxter's claim because he represented the

Union. Plaintiffs' wages are governed by collective bargaining agreements which contain various remedies for breach and alternatives for dispute resolution. As noted by the Second Circuit, it is important that all the parties receive the full benefits of their rights under the agreement.[4] There appears to be no sound basis why plaintiffs should obtain the wage benefits provided by the agreement but simultaneously repudiate the means specified in the agreement for the determination of those benefits. See Id. at 772.

In sum, plaintiffs do not present the type of seaman's claim for wages that was sanctioned by the Supreme Court in Arguelles. Arguelles may not be interposed to circumvent the grievance and dispute resolution procedures set forth in the collective bargaining agreement under which they now sue.

A dismissal of this matter will allow plaintiffs to use the procedures established by the collective bargaining agreement, and then return to the Court should those procedures prove ineffective. Once exhausted, plaintiffs' claims for earned wages may be entertained by the Court.

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[4] Plaintiffs' claim that no collective bargaining agreement underlies their claims for wages misrepresents the fact that Union membership ratified the arrangement entered into by the Union, as represented by plaintiff Thaxter, and the City. Whether the agreement was incorporated into the Union-City contract so as to be permanently binding upon plaintiffs is an issue distinct from the existence of the collective bargaining agreement itself. Furthermore, plaintiffs' claim that any such agreement violates federal law addresses the merits and may be determined by the procedures set forth in the collective bargaining agreement.

## CONCLUSION

Because plaintiffs' claims must first be submitted to grievance procedures established under the collective bargaining agreement, the Court lacks jurisdiction. Therefore, the action is dismissed without prejudice to resubmission of the exhausted claims.

SO ORDERED.

/s William C. Conner
WILLIAM C. CONNER
United States District Judge

Dated: New York, New York
November 1, 1989

## RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Constitution, Article III, Section 2:

Section 2, Clause 1. Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United states, and Treaties made, or which shall be made, under their Authority,--to all cases affecting Ambassadors, other public Ministers and consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between citizens of different States,--between citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Article VI

Clause 2. Supreme Law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

**§ 596. Time for payment**

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. R.S. § 4529; Dec. 21, 1898, c. 28, §§ 4, 26, 30 Stat. 756, 764; Mar. 4, 1915; c. 153, § 3, 38 Stat. 1164.

**§ 574. Shipping articles for vessels in coasting trade**

Every master of any vessel of the burden of fifty tons or upward, bound from a port in one State to a port in any other than an adjoining State, except vessels of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement in writing or in print, with every seaman on board such vessel except such as shall be apprentice or servant to himself or owners, declaring the

voyage or term of time for which such seaman shall be shipped. R.S. § 4520.

**§ 578. Unlawful shipments void**

All shipments of seamen made contrary to the provisions of any act of Congress shall be void; and any seaman so shipped may leave the service at any time, and shall be entitled to recover the highest rate of wages of the port from which the seaman was shipped, or the sum agreed to be given him at his shipment. R.S. § 4523.

**§ 599. Advances and allotments**

(a) It shall be unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $25 nor more than $100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment, whether made within or without the United States or territory subject to the jurisdiction thereof, shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such

offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more that $500.

(b) It shall be lawful for any seaman to stipulate in his shipping agreement for an allotment of any portion of the wages he may earn (1) to his grandparents, parents, wife, sister, or children; (2) to an agency duly designated by the Secretary of the Treasury for the handling of applications for United States Savings Bonds, for the purpose of purchasing such bonds for the seaman; or (3) for deposits to be made in an account for savings, or investment opened by him and maintained in his name either at a savings bank or a United States postal savings depository subject to the governing regulations thereof, or a savings institution in which such accounts are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation.

(c) No allotment shall be valid unless in writing and signed by and approved by the Coast Guard official to whom the duties of shipping commissioners have been delegated. It shall be the duty of the said Coast Guard official to examine such allotments and the parties to them and enforce compliance with the law. All stipulations for the allotment of any part of the wages of a seaman during his absence which are made at the commencement of the voyage shall be inserted in the agreement and shall state the amounts and times of the payments to be made and the persons to whom the payments are to be made, or by directing the payments to be made to a savings bank or a United States postal savings depository in an account maintained in his name.

(d) No allotment except as provided in this section shall be legal. Any person who shall falsely claim to be such relation, as above described, or to be a savings bank or a United States postal savings depository and as such an allottee of the seaman under this section shall for every such offense be punished by

a fine not exceeding $500 or imprisonment not exceeding six months, at the discretion of the court.

(e) This section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation.

The master, owner, consignee, or agent of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance shall be granted any such vessel unless the provisions of this section has been complied with.

(f) The Commandant of the Coast Guard shall make regulations to carry out this section. This section shall not apply to fishing or whaling vessels or yachts.

(g) The provisions of this section shall not apply to, or render unlawful, deductions made by an employer from the wages of a seaman, pursuant to the written consent of the seaman, if (1) such deductions are paid into a trust fund established for the sole and exclusive benefit of a seamen employed by such employer, and their families and dependents (or of such seamen, families, and dependents jointly with seamen employed by other employers and their families and dependents); and (2) such payments are held in trust for the purpose of providing, either from principal or income or both, for the benefit of such seamen, their families, and dependents, medical and/or hospital care, pensions on retirement or death of the seamen, life insurance, unemployment benefits, compensation for illness or injuries resulting from occupational activity, sickness, accident, and disability compensation, or any one or more of the foregoing benefits, or for the purpose of purchasing insurance to provide any one or more of such

benefits., June 26, 1884, c. 121, § 10, 23 Stat. 55; Dec. 21, 1898, c. 28, §§ 24, 26, 30 Stat. 763, 764; Apr. 26, 1904, c. 1603, § 1, 33 Stat. 308; Mar. 4, 1915, c. 153, § 11, 38 Stat. 1168; June 5, 1920, c. 250, § 32, 41 Stat. 1006; June 30, 1932, c. 314, § 501, 47 Stat. 415; May 27, 1936, c. 463, § 1, 49 Stat. 1380; May 31, 1939, c. 158, 53 Stat. 794; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097; Sept. 29, 1950, c. 1109, 64 Stat. 1081; Jan. 10, 1951, c. 1222, 64 Stat. 1239.

**§ 600. Agreements as to loss of lien or right to wages**

No seaman shall, by any agreement other than is provided by title 53 or the Revised Statues, forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of title 53 of the Revised Statutes, and every stipulation by which any seaman consents to abandon his right to his wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative. R.S. § 4535.

**§ 603. Summons for nonpayment**

Whenever the wages of any seaman are not paid within ten days after the time when the same ought to be paid according to the provisions of title 53 of the Revised Statutes, or any dispute arises between the master and seamen touching wages, the district judge for the judicial district where the vessel is, or in case his residence be more than three miles from the place, or he be absent from the place of his residence, then, any judge or justice of the peace, or any United States commissioner, may summon the master of such vessel to appear before him, to show cause why process should not issue against such vessel, her tackle, apparel, and furniture,

according to the course of admiralty courts, to answer to the wages. R.S. § 4546; May 28, 1896, c. 252, § 19, 29 Stat. 184; Mar. 2, 1901, c. 814, 31 Stat. 956.

**§ 604. Libel for wages**

If the master against whom such summons is issued neglects to appear, or, appearing, does not show that the wages are paid or otherwise satisfied or forfeited, and if the matter is dispute is not forthwith settled, the judge or justice or United States commissioner shall certify to the clerk of the district court that there is sufficient cause of complaint whereon to found admiralty process; and thereupon the clerk of such court shall issue process against the vessel. In all cases where the matter in demand does not exceed $100 the return day of the monition or citation shall be the first day of a stated or special session of court next succeeding the third day after the service of the monition or citation, and on the return or process in open court, duly served, either party may proceed therein to proofs and hearing without other notice, and final judgment shall be given according to the usual course of admiralty courts in such cases. In such suits all the seamen having cause of complaint of the like king against the same vessel may be joined as complainants, and it shall be incumbent on the master to produce the contract and log book, if required to ascertain any matter in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the burden of proof of the contrary shall be on the master. but nothing herein contained shall prevent any seaman from maintaining any action to common law for the recovery of his wages, or having immediate process out of any court having admiralty jurisdiction wherever any vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the day when such wages are due, in accordance with section 596 of this title. This section shall not apply to fishing

or whaling vessels or yachts. R.S. § 4547; May 28, 1896, c. 252, § 19, 29 Stat. 184; Dec. 21, 1898, c. 28, §§ 6, 26, 80 Stat. 756, 764; Mar. 2, 1901, c. 814, 31 Stat. 956.

**§ 10501. Application**

(a) Except for a vessel to which chapter 103 of this title applies, this chapter applies to a vessel of at least 50 gross tons on a voyage between a port in one State and a port in another State (except an adjoining State).

(b) This chapter does not apply to a vessel on which the seamen are entitled by custom or agreement to share in the profit or result of a voyage.

(c) Unless otherwise provided, this chapter does not apply to a foreign vessel.

(Pub. L. 98-89, Aug. 26, 1983, 97 Stat. 570.)

**§ 10504. Wages**

(a) After the beginning of a voyage, a seaman is entitled to receive from the master, on demand, one half of the balance of wages earned and unpaid at each prot at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement required by section 10502 of this title and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause

shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(b) The master shall pay a seaman the balance of wages due the seaman within 2 days after the termination of the agreement required by section 10502 of this title or when the seaman is discharged, whichever is earlier.

(c) When payment is not made as provided under subsection (b) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

(d) Subsections (b) and (c) of this section do not apply to:

(1) a vessel engaged in coastwise commerce.

(2) a yacht.

(3) a fishing vessel.

(4) a whaling vessel.

(e) This section applies to a seaman on a foreign vessel when in harbor of the United States. The courts are available to the seaman for the enforcement of this section.

(Pub. L. 98-89, Aug. 26, 1983, 97 Stat. 570; amended Pub. L. 99-36, § 1(a)(5), May 15, 1985, 99 Stat. 67; Pub. L. 99-640, § 10(b)(4), (5), Nov. 10, 1986, 100 Stat. 3550.)

**§ 10506. Trusts**

Section 10505 of this title [46 USCS § 10505] does not prevent an employer from making deductions from the wages of a seaman, with the written consent of the seaman, if--

(1) the deductions are paid into a trust fund established only for the benefit of seamen employed by that employer, and the families and dependents of those seamen (or of those seamen, families, and dependents jointly with other seamen employed by other employers, and the families and dependents of the other seamen); and

(2) The payments are held in trust to provide, from principal or interest, or both, any of the following benefits for those seamen and their families and dependents:

(A) medical or hospital care, or both.

(B) pensions on retirement or death of the seaman.

(C) life insurance.

(D) unemployment benefits.

(E) compensation for illness or injuries resulting from occupational activity.

(F) sickness, accident, and disability compensation.

(G) purchasing insurance to provide any of the benefits specified in this section.

(Aug. 26, 1983, P. L. 98-89, § 1, 97 Stat. 571.)

**§ 11107. Unlawful engagements void**

An engagement of a seaman contrary to a law of the United states is void. A seaman so engaged may leave the service of

the vessel at any time and is entitled to recover the highest rate of wages at the prot from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher.

(Pub. L. 98-89, Aug. 26, 1983, 97 Stat. 580.)

42 USCS § 1983

**§ 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, and Act of Congress applicable exclusively to the District Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

## WAIVER OF WAGE CLAIMS AND GENERAL RELEASE REQUIRED BY THE CITY OF NEW YORK

I, William J. Harding, for and in consideration of the benefits received by me under the terms and conditions of the collective bargaining agreement, for the period beginning January 1, 1982 and terminating December 31, 1983 between the City of New York and District Council 37 and its affiliated Local 2906, AFSCME, AFL-CIO, representing Marine employees which I have read and a copy of which has been made available to me, hereby voluntary and knowingly agree to:

1. Waive, withdraw, relinquish, and refrain from filing, pursuing or instituting

   (a) any claim for wages, supplements or other benefits, or any right, remedy, action or proceeding, which I have or may have under Section 220 of the Labor Law.

2. Discontinue any and all action or proceedings, if any, heretofore commenced by me or on my behalf under and pursuant to Section 220 of the Labor Law.

3. Extend to the City of New York a general release in the form now used by the City for similar purposes.

4. Waive any and all interest on all differentials of basic rates of wages and supplemental benefits. It is expressly understood that such waiver shall include the waiver of any right to interest payments pursuant to Subdivision 8c of Section 220 of the Labor Law (L. 1967,c. 502, Section 1) except as provided in Article IV-F.

s/ William J. Harding
(under protest)